

1                   UNITED STATES DISTRICT COURT  
2                   SOUTHERN DISTRICT OF TEXAS  
3                   HOUSTON DIVISION

4 LADDY CURTIS VALENTINE AND . 4:20-CV-01115  
5 RICHARD ELVIN KING, . HOUSTON, TEXAS  
6                   PLAINTIFFS, . MAY 8, 2020  
7 VS. . 11:00 A.M.  
8                   BRYAN COLLIER, ET AL, .  
9                   DEFENDANTS. .  
.....

10                  TRANSCRIPT OF TELEPHONE CONFERENCE  
11                  BEFORE THE HONORABLE KEITH P. ELLISON  
12                  UNITED STATES DISTRICT JUDGE

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14                  **APPEARANCES**

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OFFICIAL COURT REPORTER:

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## **PROCEEDINGS**

THE COURT: Good morning and welcome to all of you.

Let's just go through appearances of counsel one more time for my benefit in Valentine versus Collier.

*(Simultaneous cross talk)*

THE COURT: I got Mr. Keville's name. Who else?

MR. EDWARDS: Jeff Edwards also on behalf of the plaintiffs, Valentine and King.

THE COURT: Does anybody else want to speak for the plaintiffs?

*(No response)*

THE COURT: For defendant?

MS. VASQUEZ: Christin Vasquez and Jeff Farrell for the defendant.

THE COURT: Let me just see if we can get a progress report before we get into anything else.

Can you update us, Ms. Vasquez and Mr. Samuels (sic) on how many inmates at the Pack Unit have now been tested for the COVID-19 virus?

MS. VASQUEZ: I do not have specific numbers, Your Honor.

THE COURT: Who would have those numbers?

MS. VASQUEZ: Someone at TDCJ.

THE COURT: Well, how many inmates at the Pack Unit have tested positive for the virus?

11 : 02 1 MS. VASQUEZ: I don't know, Your Honor.

2 THE COURT: Have there been any more deaths from the  
3 virus?

4 MS. VASQUEZ: I believe there have, Your Honor. I  
11 : 03 5 don't know specifics.

6 THE COURT: This is pretty basic information, isn't  
7 it?

8 MS. VASQUEZ: Yes. My general knowledge is there have  
9 been, but I don't know specifics.

10 THE COURT: Do the plaintiffs have any knowledge of  
11 any of those three things; testing, positive results or deaths?

12 MR. EDWARDS: Your Honor, this is Jeff Edwards. I do  
13 not have the specific information, but I feel confident someone  
14 on the call could at least get to the website to do that.

15 We are aware through publicly -- through public  
16 documentation from TDCJ that more than a week ago, there was  
17 another COVID-19 person diagnosed at the Pack Unit, and there  
18 have been reports in the media that there have been others.

19 My understanding is that there have been numerous  
20 deaths reported from the press and the TDCJ systemwide and  
21 hundreds of -- and maybe even more than 1,000 COVID-19  
22 instances amongst correctional officers and inmates.

23 THE COURT: I saw one story in the press that put the  
24 number of positive inmates at 70 percent of some of the state  
25 prisons and I just -- I know there is a website, but press

1 stories and websites, nobody takes ownership of those facts. I  
2 need somebody to tell me who knows, and is willing to stand  
3 behind that knowledge, how many people we have in this  
4 category. I would rather not have to go to a website with no  
5 authorship or press story with --

6 MR. DUKE: Your Honor, this is Brandon Duke. I just  
7 jumped on the call for the plaintiffs. I just want to inform  
8 the Court that the Fifth Circuit has asked for this specific  
9 information by Monday from defendants. Obviously it's  
10 different counsel before the Fifth Circuit, but we understand  
11 that TDCJ is supposed to be providing this in a day or a few  
12 days to the Fifth Circuit, so I hope that they can provide this  
13 same information to the Court.

14 THE COURT: Yeah. I saw that -- I saw the paperwork  
15 on that. I'm just surprised that no one came to this hearing  
16 possessed with that information.

17 Okay. We had originally set this hearing in  
18 advance to see -- to have a date on the calendar at which we  
19 could talk about Rule 26(f) disclosures and case management, a  
20 case management plan. We were going to pull it down if there  
21 were agreement between the parties, and I see there has not  
22 been an agreement of parties. So let's talk about whatever we  
23 need to discuss on the discovery case management plan.

24 MR. EDWARDS: Your Honor, this is Jeff Edwards. I  
25 think the first issue that's most important is when the Court

11:06       1 wishes to proceed to trial. And then the second issue is when  
2 discovery can begin and, in particular, what experts would have  
3 to be designated.

11:06       4 It is the plaintiffs' position that, given the  
5 importance of this case and the imminence of harm, that we  
6 should expedite the trial. We proposed a July 6 trial date,  
7 and in order to make that feasible, we propose that we would  
8 designate our experts next week on the 15th and that the  
9 defendants would designate their experts three weeks later.

11:07       10 Also, in order to make that work, we propose  
11 expediting discovery. Instead of 30 days to respond to  
12 documents and interrogatory requests, we have asked that that  
13 be limited to 15 days.

11:07       14 And, finally, the biggest issue -- another issue  
15 that we are going to have to deal with is the defendants have  
16 sought to stay discovery. Obviously, the plaintiffs are  
17 opposed to that, and I imagine we are going to be before the  
18 Court trying to force people with knowledge at the highest  
19 levels to testify. That's going to bring into play the issues  
20 relating to the intervention and how that demanded discovery in  
21 this case. But I think from a starting point, what the Court's  
22 position on trial and when that should be will dictate, I  
23 think, some of the defendant's responses.

11:08       24 We are not comfortable waiting until November to  
25 try this case given the potential outcome.

11 : 08 1 Thank you, Your Honor.

2 THE COURT: Mr. Samuels or Ms. Vasquez, do you want to  
3 speak to that?

4 MS. VASQUEZ: Yes, Your Honor. We propose a November  
11 : 08 5 trial date. That is still an expedited schedule. Given the  
6 appeal, the motions to dismiss on file, the number of  
7 depositions and the level of officials the plaintiffs have  
8 stated that they want to depose during the height of this  
9 pandemic, it is going to take some time to pull those people  
11 : 08 10 away.

11 Also, there is this looming intervention and  
12 defendants -- you know, once the plaintiffs file a motion to  
13 certify a class, we think it would be appropriate to bifurcate  
14 discovery. I think that all that needs to be done in this case  
11 : 09 15 is going to take until November to complete.

16 Also, with regard to the expedited discovery, I  
17 told Mr. Edwards we would be willing to expedite discovery to  
18 an extent, but without seeing the number of requests that are  
19 being propounded at any given time, we can't agree to a  
20 flat-out date that we can respond by. I think it would just  
21 have to be dependent on how much discovery they are requesting  
22 at any given time.

23 THE COURT: Was that the only disagreement about --  
24 that emerged from the Rule 26 discussions? Or do we need to  
11 : 09 25 talk about others?

11:09 1           MR. EDWARDS: No. There are other issues. Well,  
2 there are issues as to whether or not the protective order in  
3 the Cole case, whether information and details can be shared  
4 with co-counsel Winston Strawn. The defendant's position is  
5 unless we specify the exact document and the exact piece of  
6 information, they are unable to agree to us sharing information  
7 with our co-counsel. You know, I'm sorry to have to bring this  
8 to the Court, but, you know, we think it is very important that  
9 any information that we happen to have because of knowledge of  
11:10 10 inmates' medical conditions at the Pack Unit and those class  
11 members, that we are able to discuss freely with co-counsel  
12 solely for use in this case.

13           Again, I apologize to the Court that we need to  
14 involve you in this, but we do, because the refrain we get from  
11:10 15 the defendants is, We will consider what you ask. It is never  
16 no and it is never yes. It is only, We will take that to our  
17 clients and consider it. And, again, given the timing and the  
18 importance of that, we can't be in a position to be dealing  
19 with that anymore, which is why the request for an expedited  
20 deadline of 15 days, rather than 30, as a starting point is so  
21 important.

22           Again, this is exactly how the conversation will  
23 go in the future if we adopt Ms. Vasquez's proposal: There's  
24 too many, we can't make the deadline, we will consider it, we  
25 will get back to you. But ultimately the decision is going to

11:11 1 be no.

2 Again, if there are voluminous requests that they  
3 need more time on, obviously reasonable extensions will be  
4 appropriate, but the starting point has to be: This is  
5 important and it needs to be expedited.

6 Those are really the only extra issues though.

7 We would ask the Court to comment though on our ability to  
8 share information with our co-counsel, Winston Strawn, without  
9 fear of violating a potential protective order.

11:12 10 THE COURT: What we talking about is the information  
11 that was provided in the Cole versus Collier case? Is that the  
12 universe of information we are talking about?

13 MR. EDWARDS: Yes, Your Honor. Just that number.

14 MS. VASQUEZ: May I respond, Your Honor?

15 THE COURT: Yes. Yes. By all means.

16 MS. VASQUEZ: Thank you.

17 Your Honor, this isn't a motion to certify the  
18 class in this case. Currently it only pertains to plaintiffs  
19 Valentine and King. TDCJ would agree to give the plaintiffs  
20 their own medical records.

21 We have been asking since they filed their motion  
22 to modify the protective order three weeks ago to designate  
23 Bates pages that they want to duplicate for this case, and  
24 maybe we could agree. Last night, I finally received some  
25 Bates pages, and they included some photos. The photos -- four

11:12       1 of the photos were from UTMB. They are not a part of this  
11:13       2 protective order that the plaintiff sought to modify. The  
11:14       3 remaining photos are -- they were taken five years ago during  
11:15       4 the heat litigation. I think that at least some of them don't  
11:16       5 accurately depict the Pack Unit, although I don't think that  
11:17       6 TDCJ is going to argue that they are confidential. I think  
11:18       7 that they are fine with letting the other lawyers see those  
11:19       8 photos, just with the understanding that they may be different  
11:20       9 than the representations of the Pack now.

11:13       10                  THE COURT: Are you asking the Court -- are you asking  
11:14       11 the plaintiffs to bring their motion to certify now before  
11:15       12 discovery starts?

11:13       13                  MS. VASQUEZ: I'm saying that I think that a motion to  
11:14       14 certify the class, if they are looking for class discovery,  
11:15       15 that's what would need to be done.

11:16       16                  THE COURT: Well, I'm sure that could be done.

11:17       17                  Yes. Go ahead.

11:14       18                  MR. EDWARDS: I'm sorry. Would defendant's counsel  
11:15       19 stipulate that they will begin discovery as soon as that motion  
11:16       20 is filed?

11:17       21                  MS. VASQUEZ: We still would stand on our motion to  
11:18       22 stay given the pending interlocutory appeal and the 12(b)  
11:19       23 motion.

11:14       24                  THE COURT: So you think that the 12(b) motion needs  
11:15       25 to be resolved and the interlocutory appeal resolved before you

11 : 14 1 do any discovery?

2 MS. VASQUEZ: Yes, Your Honor, in order to narrow the  
3 issues so we know what we are moving forward on.

4 MR. EDWARDS: Your Honor, this is Mr. Edwards.

11 : 14 5 Does that merit a response?

6 THE COURT: Yeah. Go ahead. I don't know how we are  
7 going to decide class certification without doing some  
8 discovery.

9 Mr. Edwards?

11 : 14 10 MR. EDWARDS: To the extent it matters, the issues of  
11 class discovery and merits discovery are going to greatly  
12 overlap. We are talking about the uniform policies in play and  
13 how they are being implemented at the Pack Unit. The case is  
14 about deliberate indifference. It is going to involve senior  
11 : 15 15 leadership at TDCJ on class-wide discovery and merits  
16 discovery. You know, the rigorous analysis that needs to be  
17 done for class certification discovery, you know, really  
18 commonality and typicality are going to be almost givens in  
19 this case and so really it's adequacy of the actual plaintiffs  
20 in this case. And the Court has already heard testimony and,  
21 you know, while my opinion may not be dispositive, you know, it  
22 will be difficult for me to imagine a situation where they  
23 weren't knowledgeable of the litigation and actively engaged in  
24 such that they are adequately representing the interests of the  
25 class.

11:16                   1                 While class certification is obviously important,  
11:16                   2 we can have a motion on file very quickly, if that's necessary,  
11:16                   3 but it's really not because there is nothing in the law that  
11:16                   4 prevents discovery while a pending motion to dismiss is on file  
11:16                   5 in an injunctive relief case. There simply isn't any. And,  
11:16                   6 you know, we routinely litigate against the Attorney General's  
11:16                   7 office, TDCJ, UTMB and never are -- rarely are stays even  
11:16                   8 sought, let alone in a case the magnitude of this. But if --  
11:16                   9 that's why I asked if they would stipulate that they would  
11:16                   10 begin discovery in the class certification motion.

11                     What is happening here is the defendants are  
12 putting up, you know, potential hurdles and then just seeking  
13 to find other hurdles. We are way past that point. We had an  
14 injunction hearing. The Court has ruled. While it is on  
15 appeal and there are differing interpretations of what the  
16 Fifth Circuit may do, no one knows what the Fifth Circuit may  
17 do. And we need to take discovery in order to prepare the case  
18 for trial, and so I still think the most important issue before  
19 the Court is how do we get this case tried expeditiously? And,  
11:17                   20 again, we have put forward a plan to put forth designation of  
21 experts without even taking full discovery to do that, to make  
22 that possible, you know. Obviously, this is a small  
23 consolation, but every lawyer on here has a busy practice, and  
24 we are willing to get this done by July 6th in the interest of  
25 the class.

11:17                   1 There will be a motion for class certification  
2 filed as soon as the Court wants it to be heard. We probably  
3 will file it as an emergency motion and ask for expedited  
4 relief. But, again, if that is a hurdle that there is actually  
11:18                   5 something at the end of the day for jumping over it, we will  
6 meet it forthwith or right away. This, again, class  
7 certification isn't really the issue here. The issue is, you  
8 know, are the policies that have been put in place, you know,  
9 the epitome of deliberate indifference in that they are failing  
11:18                   10 to protect the inmates? And, again, the Court has made its  
11 ruling based on the available evidence. All we are saying is  
12 getting this case to trial as soon as possible is what needs to  
13 happen when the consequences are this serious. And the  
14 defendants again, you know, they are raising points that, you  
11:18                   15 know, that fail to account for the fact that this is a case of  
16 potential eminent harm. And, you know, we need this  
17 information. Discovery has already been sent on some very key  
18 issues. We need that responded to. And, unfortunately,  
19 without the Court's intervention and some real deadlines, the  
20 response is going to be, We will consider it. Not, We agree or  
21 we refuse, we will just consider it, which is kind of the  
22 slow-playing way that this is happening.

23                         Again, I'm happy to address any issue related to  
24 class certification, any issue for how to make discovery go  
11:19                   25 more smoothly. Defense counsel brought up the concern about

11:19           1 intervenors. We are happy to consolidate discovery with the  
2 potential intervenors without making a determination as to  
3 whether or not ultimately the cases should be tried together.  
4 Counsel for the intervenors may want to weigh in on that issue,  
11:20           5 as well as maybe the Attorney General's office. But they can't  
6 on the one hand say, Well, the plaintiffs wish to depose the  
7 senior leaders in TDCJ and they are busy dealing with the  
8 COVID-19 virus and ask for -- you know, when we are willing to,  
9 again, do whatever we can to expedite this discovery, minimize  
11:20           10 the burden on those people, so that they can actually help.  
11               11 But they are the ones who have information. And given that the  
12 case, you know, turns on deliberate indifference, what they  
13 know, when they knew it and what they are doing as a  
14 consequence of it, that's information that we simply have to  
11:20           15 have and have to get. And so, you know, with all due respect  
16 to defense counsel, their leadership has to make some time  
17 given these allegations and the Court's findings.

18               Thank you.

19               THE COURT: Ms. Vasquez, it does seem like the Fifth  
20 Circuit believes the critical issue is deliberate indifference.  
21 I don't know how we are to approach that issue other than with  
22 discovery.

23               MS. VASQUEZ: Your Honor, the Fifth Circuit has not  
24 stated that.

11:21           25 THE COURT: I think they felt like that is what was

11:21 1 missing from the preliminary injunction. There was a holding  
2 that they are not -- plaintiffs actually pled there was  
3 deliberate indifference. And I think that is -- whether or not  
4 the Fifth Circuit says that, I think that is the ultimate issue  
5 in this case, and I don't know how we approach that other than  
6 by finding facts.

7 If you want to, we can stipulate to some facts  
8 and argue about whether those facts constitute deliberate  
9 indifference, but absent that, we need to get some facts.

11:22 10 MS. VASQUEZ: Well, there were facts presented in the  
11 TRO hearing with the evidence attached, but I think, Your  
12 Honor, the point is that the Fifth Circuit is still  
13 contemplating the injunction. And I think that it's  
14 appropriate to wait for their opinion so that we can have some  
15 guidelines to operate off of as well as the pending 12(b)  
16 regarding exhaustion. I think the Fifth Circuit was pretty  
17 clear that the plaintiffs did not seek to exhaust before they  
18 filed the lawsuit, which is dispositive.

19 THE COURT: Well, there is a lot of law developing on  
20 that issue systemwide with the COVID-19 virus and there is --  
21 there are now some holdings that in the face of this emergency,  
22 exhaustion is not necessary. It seems like a common sense  
23 position. Because if we waited for the plea to go to the  
24 Warden and then the appeal from the Warden, it might mean  
25 serious health effects for inmates while they are waiting to

11 : 23      1 get the ruling. I mean, I can't imagine a likelier case for  
2 waiver of administrative exhaustion than this case.

11 : 23      3                 How long will a complete administrative  
4 exhaustion take? It would be 30 days with the Warden and who  
5 knows how much time for administrative appeal. Right?

11 : 23      6                 MS. VASQUEZ: Yeah. I think it's a little bit shorter  
7 for this step too, but I would just -- if Your Honor is  
8 inclined to allow some discovery to go forward, I would ask  
9 that it be tailored only to the plaintiffs in this case --  
10 there is no class as we sit here today -- and also tailor it to  
11 issues that are relevant to the 12(b) pending.

12                THE COURT: How are we going to judge issues of  
13 commonality without some discovery?

11 : 24      14                 MS. VASQUEZ: Your Honor, he hasn't filed his motion  
15 to certify the class yet, so I don't know what kind of class he  
16 is seeking to certify, so I can't answer that. All I know is  
17 that he has two plaintiffs that are named, so I think that at  
18 the very most would be appropriate for discovery with the  
19 12(b)s pending.

11 : 24      20                 THE COURT: I would say that that would have been  
21 appropriate for Rule 26 initial information, that is the basic  
22 info about these named plaintiffs. There shouldn't be a need  
23 for interrogatories or requests for admissions or document  
24 production with the named plaintiffs.

11 : 24      25                 Can't the defendants just provide that

11:24 1 information?

2 MS. VASQUEZ: Yeah. We will -- I said earlier in the  
3 call, TDCJ will provide the plaintiffs with their medical  
4 records.

11:25 5 MR. EDWARDS: Your Honor, this is Mr. Edwards. May I  
6 respond briefly?

7 THE COURT: Yes, you may. Yes, you may.

8 MR. EDWARDS: That sums up the defendant's position.  
9 They don't -- whether it is tactically, or for some other  
10 reason, they are misunderstanding what this case is about.  
11 This case concerns a contagion in the Pack Unit that affects  
12 every member; therefore, discovery as to Mr. Valentine and  
13 Mr. King necessarily includes discovery about who else was  
14 infected, what they are doing in other areas of the prison, the  
15 correctional officers, are the precautions adequate, are there  
16 policies that they are adopting, primarily in the consequence  
17 of this lawsuit, I might say? Are they actually being  
18 enforced? Are the Wardens directing them properly? Those are  
19 fact issues that, again, you can't separate those out based on  
20 whether there is a class certification motion filed or not.  
21 But the mere fact that defense counsel is offering to give  
22 medical records that actually belong to the clients, those  
23 aren't the records we need. We know what their medical  
24 conditions are. We know the effects of that. What we need to  
25 ask questions about are, Well, what do you know about their

11:26           1 medical conditions? What do you know about generally medical  
11:26           2 conditions, how that makes you more vulnerable to the COVID-19  
11:26           3 virus? What are you doing that's different at the Pack Unit  
11:26           4 given its elderly and vulnerable population? These are  
11:26           5 questions that we have to ask. You know, we are planning on  
11:26           6 starting the depositions with Warden Herrera, you know, and we  
11:26           7 need to do that right away. This isn't a cause for, well,  
11:26           8 let's give some medical records to the plaintiffs. Again, they  
11:26           9 know our plaintiffs. Our plaintiffs have essentially testified  
11:27           10 and been subject to cross-examination already. We are happy to  
11:27           11 put them up for a deposition. But the idea that discovery  
11:27           12 should stop in this case, again, there is no legal support for  
11:27           13 it. And, again, while we can all try to discern what the Fifth  
11:27           14 Circuit may or may not do, the fact of the matter is the issue  
11:27           15 that was ruled upon was related to the stay. And while the  
11:27           16 stay implicates, you know, success -- likelihood of success on  
11:27           17 the merits, it is merely advisory. And so, you know, this  
11:27           18 Court has heard evidence and, you know, TDCJ made a conscious  
11:27           19 choice not to put up witnesses for cross-examination. And  
11:27           20 while, you know, in my opinion, that evidenced that they knew  
11:27           21 about the problem and there was ample evidence to support a  
11:27           22 finding of deliberate indifference. Again, you know, to the  
11:27           23 extent they are going to make this argument that they weren't  
11:27           24 deliberately indifferent, we have to be permitted to question  
11:28           25 them about that to show that they were, unless, as the Court,

11:28           1 you know, hinted at, the defendants are willing to stipulate  
2 that they knew the COVID-19 outbreak was in the Pack Unit, they  
3 knew the precautions could not stop it from spreading, and they  
4 know that their policies are deficient. Again, I don't imagine  
11:28           5 that defendants would stipulate to that. They are not really  
6 willing to stipulate to anything, even benign suggestions. So,  
7 unfortunately, again, the law favors allowing discovery to the  
8 extent it doesn't require us in this particular case to file a  
9 class action as a motion for class certification. All that  
11:29           10 that does -- you know, once that happens, then we fall into the  
11 argument from defense counsel, Well, we should bifurcate the  
12 discovery. Bifurcating discovery in this case makes no sense,  
13 you know, because the same questions are going to be asked,  
14 whether or not it is Laddy Valentine individually making his  
11:29           15 ADA claim or 1983 claim or as a class rep or as an individual  
16 plaintiff. The same questions, the same concerns.

17                 The only thing that it potentially implicates is  
18 broader issues in other prisons, but even that really isn't the  
19 case because one of the allegations here is that TDCJ brought  
20 prisoners into the Pack Unit from other facilities and that  
21 correctional officers came from other facilities. So even  
22 those other facilities as to Mr. Valentine and Mr. King's  
23 individual claims are relevant. They become especially  
24 relevant when you get into the situation of class discovery and  
25 all of the different inmates and all of the different

11 : 30 1 movements.

2                   There are -- there is work to be done by defense  
3 counsel in this case in terms of identifying the inmates,  
4 telling us who has been infected, telling us what testing, if  
5 any, has been done, and they simply don't want to do it. They  
6 won't even tell us the second confirmed, identified inmate who  
7 got COVID. Worse than that, I think their argument is going to  
8 be, Well, we moved that person to another facility; therefore,  
9 it's not relevant. So there is a bit of a potential show game  
11 : 30 10 happening here that we need to delve into. And, so, again,  
11 discovery is vital in this case. It goes to the heart of the  
12 claims under class certification principles or just individual  
13 principles. We are entitled to it, and, again, it goes to the  
14 core of the case. And we would ask that it begin immediately;  
11 : 31 15 that their motion to stay discovery be denied and that we be  
16 permitted to do discovery and that the Court seriously consider  
17 the competing proposals. Their proposal is: Do it the same  
18 way with a trial in November. Ours is: It's too important.  
19 We need to expedite the deadlines and the designation periods  
20 and move as quickly as possible. All that being said, we are  
21 happy to minimize the burden on executive leaders by, you know,  
22 coordinating discovery with other cases, if that is of any  
23 benefit to the other side. But what can't be done is they  
24 can't on the one hand say, The crisis is an emergency, all of  
25 our leadership needs to devote 100 percent of their time to it,

11 : 31       1 it is so important, and then deny the obvious, which is, we  
2 agree on that, but what are you doing about it? We need to  
3 have a trial about it to see if what is being done adequately  
4 protects the inmates or if it is indifferent. They want to  
11 : 32       5 just say, Hey, it's an emergency; therefore, we don't have to  
6 pursue the case. That can't be permitted.

7                  Thank you, Your Honor.

8                  THE COURT: Can't we resolve a lot of this  
9 disagreement and couldn't we save a lot of time for TDCJ  
11 : 32       10 executives, the lawyers and those who will look at the  
11 documents if we just had a few simple stipulations?

12                  Couldn't we stipulate that in a prison, there is  
13 no way possible to keep all the inmates at least six feet  
14 apart? Couldn't we stipulate that meals and showers and many  
11 : 32       15 recreational activities are done in groups where some mixing  
16 among inmates is inevitable? Couldn't we likewise agree on how  
17 many tests have been administered and what the results of those  
18 tests are? All of this I can see saving us a lot of time in  
19 depositions and saving us a lot of time in discovery.

20                  Is that not possible, Ms. Vasquez?

21                  MS. VASQUEZ: That might be possible, Your Honor.

22                  THE COURT: That's the kind of thing I was hoping --  
23 go ahead.

24                  MS. VASQUEZ: I was going to say at the same time,  
11 : 33       25 Your Honor, the plaintiffs, they are trying to get class-wide

11 : 33      1 discovery before they have even filed the motion to certify the  
2 class. Also, they want the protective order in Cole applied to  
3 Valentine, but they won't even give us documents they want to  
4 use. They are trying to skip the entire process and -- at our  
11 : 33      5 expense, so, I think, Your Honor, I think it would be  
6 appropriate to require the plaintiffs to go through the proper  
7 steps in order to get the information that they need, require  
8 both of us to go through the proper steps.

11 : 34      9 THE COURT: But what I'm saying is if we stipulated to  
10 a few simple and, I think, self-evident facts, we could show  
11 commonality, we could show numerosity, we could show adequacy  
12 of representation. I mean, it is such -- discovery is always  
13 burdensome, and it is particularly burdensome when the same  
14 results could be achieved by agreeing on self-evident facts. I  
11 : 34      15 understand no senior executive likes to be made a deponent in  
16 every case that's filed. I understand that. I think we can  
17 get to a place where depositions either could be omitted or  
18 sharply curtailed if we could just agree on facts on the  
19 ground. I know producing hundreds of thousands of documents is  
20 very time consuming and very expensive. As a taxpayer, I'm not  
21 inclined to put the state through that expense, but we need  
22 to -- as lawyers, we need to generate some options so that we  
23 can avoid all of that.

24            24 MS. VASQUEZ: Yes, Your Honor. I lost my train of  
25 thought.

11 : 35           1         THE COURT: Talking about stipulations, whether we  
2         could avoid having to take the time of your senior executives,  
3         whether we could avoid having to produce these hundreds of  
4         thousands of documents.

11 : 35           5         MS. VASQUEZ: Yes. I think this whole conversation is  
6         a bit premature because we don't even know what kind of class  
7         or subclasses the plaintiffs want to certify. So while this  
8         conversation might be fruitful, we don't even -- there is no  
9         motion to certify the Pack, Your Honor. I don't know what they  
11 : 35           10        are trying to certify.

11                11         THE COURT: I don't think it's a mystery. I think you  
12         could look at what was alleged in the motion to certify the  
13         class in the Cole versus Collier case and get a pretty good  
14         idea. We have a limited population in a certain space, subject  
15         to common administration, worried about a common threat. I  
16         don't think it is going to be complicated to figure out what  
17         the class allegations --

18                18         MS. HOCKMAN: If I might, Your Honor?

19                19         THE COURT: Who is speaking, please?

11 : 36           20         MS. HOCKMAN: This is Cori Hockman for the plaintiffs.

21                21         THE COURT: Yes, ma'am?

22                22         MS. HOCKMAN: I can refer the defendants to page 24 of  
23         our complaint which begins our class action section. It  
24         outlines who the class is, who our subclasses are, and it goes  
25         through each of the four requirements for class certification

11:36 1 and gives some insight into what we plan to argue in our class  
2 certification motion.

11:37 3 THE COURT: I don't think we need to harbor or  
4 entertain any doubt about what the case consists of. If we  
5 need a motion -- I really don't think this dispute hinges on  
6 whether a motion has been filed. In class action, there is  
7 always attention to, Do you try to do some discovery before you  
8 file your motion to certify and risk being met with the  
9 argument that it is premature? Or do you wait and not do any  
11:37 10 discovery before class certification and be met by the argument  
11 that you haven't shown any estimable hypothesis, any raw facts,  
12 any current data to support the request for class  
13 certification? It is always a little bit of a dilemma when you  
14 file a motion to certify.

11:37 15 But I do believe -- from what I have heard in  
16 this hearing and others, I do believe the state is going to be  
17 ready to make an argument that there are no facts to support  
18 the class allegations, and that's what I'm trying to  
19 anticipate.

11:38 20 Are you willing to stipulate the fourth criterion  
21 for class action, that representative parties will fairly and  
22 adequately protect the interests of the class? Is that  
23 something you can stipulate to?

24 MS. VASQUEZ: I'm not prepared to talk about the class  
25 certification issues right now. I was prepared to talk about

11:38       1 scheduling and the Rule 26(f). I would be happy to have this  
2 discussion, you know, when there is a proper hearing or motion  
3 about it.

11:38       4 THE COURT: Well, in terms of scheduling and Rule 26,  
5 trying to find a workable schedule is contingent on how many of  
6 these pretty forward factual issues can be agreed in advance.  
7 I mean, if the state is going to argue every step of the way  
8 against certification, I guess they are saying they need a  
9 delayed trial date for that reason. That seems to me unfair to  
11:39       10 both say you can't be ready in time and do everything possible  
11 to make sure plaintiffs can't be ready in time. There is just  
12 no need in this case, given the gravitas of the timing issue,  
13 to be in disputes about the simple class action criteria. And  
14 I don't know how you do Rule 26 disclosures without some  
11:39       15 sensitivity to what the class issues are.

16           MS. VASQUEZ: Well, we have -- we appreciate the  
17 gravity of the situation and the expedited need for a schedule,  
18 and given that, we have agreed that November is a good trial  
19 date for all the discovery that does need to be done, also  
20 taking into account the appeal that is pending as well as the  
21 12(b)s that are pending.

22           THE COURT: Well, there is no prohibition on doing  
23 discovery while a motion to dismiss is pending. Motions to  
24 dismiss are getting to be so common they are almost a feature  
25 of every lawsuit now.

11 : 40                   I am afraid this has not been productive. I  
1 guess I will just take under advisement rulings on issues as to  
2 Rule 26, particularly the trial date.

4                          Does anybody else want to say anything?

11 : 41                   MR. DOW: Judge, this is David Dow. I'm representing  
5 the aspiring intervenors. And just for the sake of making the  
6 record clear and to put a figure into Your Honor's decision,  
7 the intervenors would be prepared to adhere to any discovery  
8 deadlines and other deadlines that are appropriate for the  
9 principal plaintiffs.

11                       THE COURT: Thank you, Mr. Dow.

12                       Thank you very much, everyone, for your virtual  
13 attendance. You are excused.

14                       *(Court adjourned at 11:41 a.m.)*

15                       \* \* \* \*

16                       I certify that the foregoing is a correct transcript from  
17 the record of proceedings in the above-entitled cause.

18  
19 Date: May 12, 2020

20                       *1st Mayra Malone*  
21 -----  
22 Mayra Malone, CSR, RMR, CRR  
Official Court Reporter

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